United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4253

To be argued by
Haynes N. Johnson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-4253

MIANUS RIVER PRESERVATION COMMITTEE,
FRANK E. WOLF, CHARLES H. BIEDERMAN,
and ROBERT D. HENKLEIN,

Petitioners,

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION
AGENCY, and COMMISSIONER, STATE OF CONNECTI-
CUT, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Petition For Review of NPDES Permit
Modification Issued By Respondents

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P/S

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

I

PRELIMINARY STATEMENT

This is a petition for review of a modification of a National Pollution Discharge Elimination System permit ("NPDES" permit), issued under the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), P.L. 92-500, 33 U.S.C. §1251 et seq.. The modified permit was issued by

Robert B. Taylor of Respondent Department of Environmental Protection to the Greenwich Water Company on August 26, 1975, as No. CT0001325 (App. 1). As a result of a hearing held on June 25, 1975; it modified an earlier permit of March 10, 1975 (App. 6).

As modified, the permit no longer requires pollution reduction by the date set forth in the Act, nor does it require that the permittee itself act to reduce the pollution. The steps required are outside permittee's control.

II

STATEMENT OF ISSUES

1. May an agency properly issue an NPDES water discharge permit which extends the date for pollution reduction beyond that mandated by statute?

2. Is an NPDES permit valid if it imposes clean-up requirements on the permittee that are not within the control of the permittee, i.e., conditions which depend upon actions of third parties and which may or may not occur?

3. Does not the Federal Environmental Protection Agency have the duty to watch for and override NPDES permits issued by a State which are not in accordance with the Federal enabling statute and EPA's regulations thereunder?

III

STATEMENT OF THE CASE

A. Background

This petition results from the modification on August 26, 1975 (App. 1) of an NPDES permit granted to the Greenwich Water Company, a subsidiary of American Waterworks Company, Inc.

The Greenwich Water Company has a reservoir formed by a dam on the Mianus River in Cos Cob, Greenwich, Connecticut. It takes water from the reservoir, adds chemical flocculating agents to it, filters the water, and then disposes of the chemically-treated flocculants in the River below the dam (at the head of a mile-long lake formed by the River). Deposits in the lake resulting from this practice are, in some places, over five feet deep (App. 16). Petitioners reside on the River below the Water Company.

B. Prior Orders

The water pollution here before the Court goes back to 1970, and probably 1955 (App. 15, 16).

On May 22, 1972 (prior to the Federal Act now in issue), the Connecticut Department of Environmental Protection issued an order to the Greenwich Water Company requiring clean-up (App. 34, 17). The order required an engineering

report, by August 31, 1972, detailing proposed treatment of the wastewaters and completion of the needed facilities by June 30, 1973 (App. 17).

The Engineering Report was submitted. Full plans and specifications to implement it were proposed and approved on January 10, 1974 (App. 19). Thus, the whole problem could have been resolved two years ago; and plans permitting an immediate solution exist.

Instead, the order was, in due course, converted by the State into an NPDES permit[1] (under the Act, all discharges had to be "permitted" by December 31, 1974; 33 U.S.C. §1342(k)). This permit, issued on March 10, 1975 (App. 6), required pollution reduction by July 31, 1977 (App. 10); and the clean-up was to be by means of one of two alternatives:

1. construction of the previously-approved treatment facilities (App. 10); or

2. connection to a non-existent sewer system that might be built in the future (App. 10).

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1 The EPA had delegated part of its permitting authority to the Connecticut Department of Environmental Protection on September 26, 1973, allowing Connecticut to act as the EPA Administrator's agent. The delegation required:

> "The program that you conduct pursuant to this authority must at all times be in accordance with section 402 of the Act, [and] all guidelines promulgated pursuant to section 301(h)(2) of the Act...Specifically your attention is directed to...[the] goal [of] the issuance of NPDES permits to all dischargers in the State of Connecticut by December 31, 1974..." (From Ex. A attached to DEP's Motion to Dismiss; emphasis supplied.)

It should be noted that the first of these solutions was within the control of Greenwich Water Company and the second, hook-up to a prospective sewer line, was not.

Regardless, this permit set a compliance date almost four years after that of the 1972 order and a month after that required by the Federal statute: use of best practical technology ("BPT") for reduction of water pollution by June 30, 1977, 33 U.S.C. §1311(b)(1)(A).

C. The Modified Order of August 26, 1975 (Now in Dispute)

Objections were made to the Order of March 10, 1975 (App. 6, 34) by those who had complained in 1972, so the Connecticut DEP held a hearing on June 25, 1975,[2] and thereafter, on August 26, 1975, modified the permit (App. 1, 4).

The present modified permit of August 26, 1975 states the asserted authority under which it was modified:

> "This order modification is authorized to be issued by Chapter 474a, Connecticut General Statutes and Section 402(b), [33 USC §1342(b)] Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 et. seq., and pursuant to an approval dated September 26, 1973, by the Administrator of the United States Environmental Protection Agency for the State of Connecticut to administer an N.P.D.E.S. permit program." (App. 1)

The permit went on to state that, specifically, it was modified under Conn. G.S. §25-54o (App. 1).

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2 The record filed by the State Respondent included hearing exhibits, but no transcript of the hearing (even though it was taped at the time). This occurred in spite of this Court's order of March 22, 1976, requiring filing of the record.

The modified order of August 26, 1975:

1. Eliminated the alternate allowing the permittee Greenwich Water Company to build its own treatment facility, and simply required permittee to discharge into a non-existent and proposed sewer line (App. 4); and

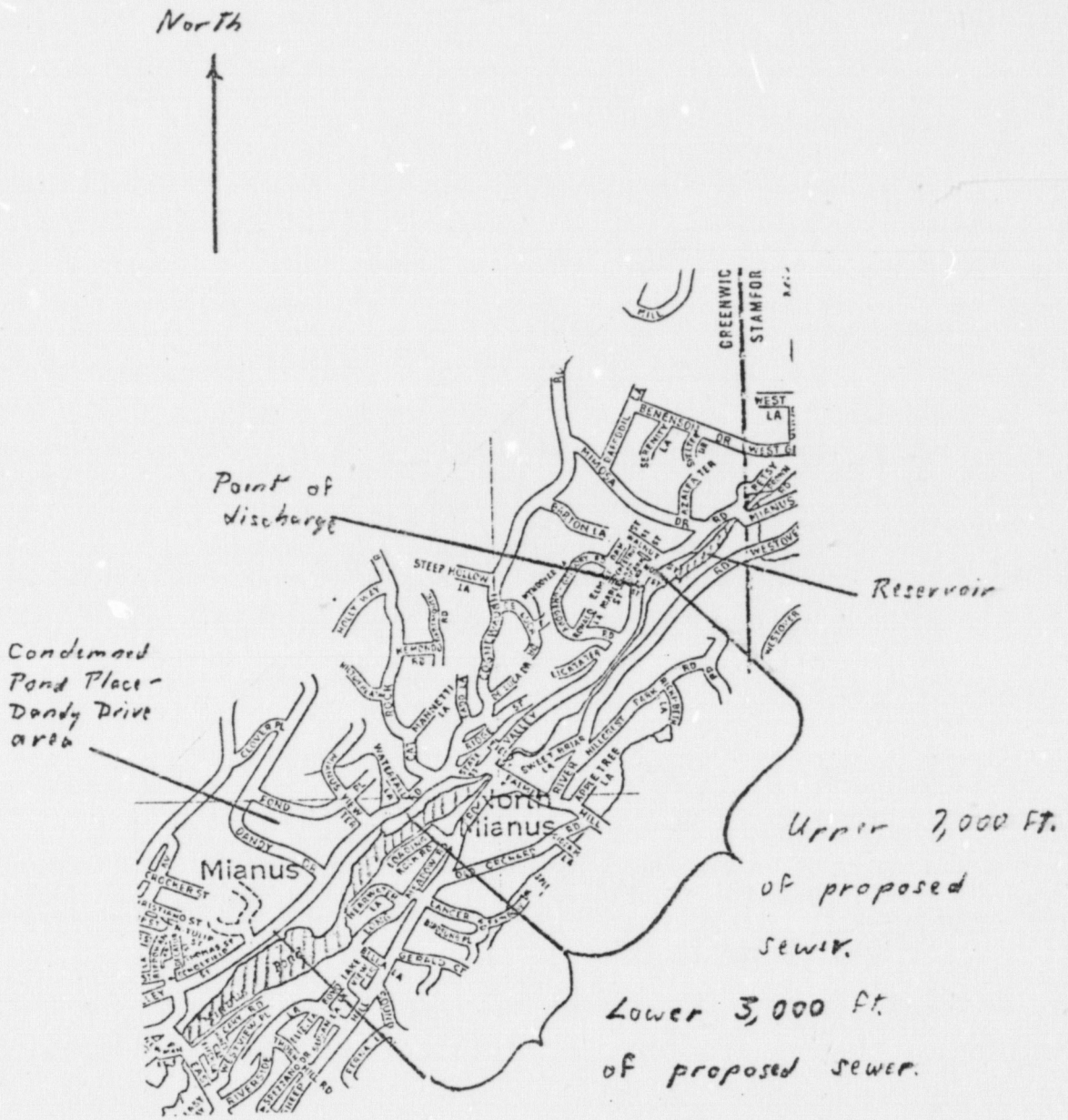
2. Extended the date for compliance by one year, to July 31, 1978 (App. 4), 13 months after the FWPCA date.

Facts that came out at the hearing included:

1. The long-standing pollution of the River, as set forth above, and prior orders relating to same (App. 15 et. seq.).

2. That the Greenwich Representative Town Meeting had, on June 9, 1975, six days before the hearing, deferred any consideration of a new sewer line (App. 26; Hearing Ex. 8 and 9).

3. That 3,000 feet of new sewer was needed to service the southern so-called Dandy Drive-Pond Place area of Cos Cob (the area had been condemned in 1972 by the Health Department (App. 24, 35); but no need yet existed for the additional 7,000 feet to the north that would be needed to reach the Greenwich Water Company (App. 24). (See map next page.) In fact, the now-proposed Water Company use was not even considered in the Town's sewering study (App. 23). And, so far, four years later, construction of the southern 3,000 feet has not even begun (App. 28).



Map of Proposed Sewers

4. That, assuming everything went "right", including a decision (in the first place) to build a sewer line all the way, prompt engineering, State and Federal approvals, and State and Federal financial grants, the earliest possible completion date for just the first 3000 feet (Pond Place-Dandy Drive) sewer line would be July 1978, a year later than the date in the prior permit (App. 35). Nothing in the record establishes that the entire sewer, or even part of it, will be completed by July 1978, or even that the necessary Federal, State, and town approvals have been, or will be, obtained.

Thus, the modified permit required action by the permittee Greenwich Water Company (1) that was beyond the permittee's control (use of a non-existent sewer), and (2) that was to be done a year after the statutory date.

By contrast:

(1) The 1972 order, if enforced, would have been complied with almost three years ago (App. 17).

(2) The March 10, 1975 permit, if enforced, would result in compliance by July 1977.

(3) The parent of Greenwich Water Company has already modified some dozen installations elsewhere to prevent pollution (admitted at hearing) and the technology exists (Hearing Ex. 12). Here, however, it is claiming poverty (App. 19-20), and so seeking a new sewer line instead.

D. The Nature of NPDES Permits

NPDES permits are the vehicle under which polluters' discharges into the nation's waters were to be reduced. Discharges required a permit; and permits required reduction. 33 U.S.C. §1342

Passage of the 1972 Federal Act required that:

1. By July 1, 1977, there would be pre-treatment of discharges by the best practical technology ("BPT"), 33 U.S.C. §1311(b)(1)(A); and

2. By July 1, 1983, the pre-treatment would use best available technology ("BAT"), 33 U.S.C. §1311 (b)(2)(A).

(In the present case, there is no question that "BPT" techniques exist; they have already been used by the parent of permittees.)

Respondent EPA issued regulations to effectuate these statutory dates. They even included requirements that would prevent inaction until the compliance date by requiring staged performance by the permittee at no greater than nine-month intervals 40 C.F.R. §124.44.

ARGUMENT

I

THE MODIFIED PERMIT IS INVALID BECAUSE IT FAILS TO REQUIRE COMPLIANCE BY JULY 1977

The 1972 Amendments to the Federal Water Act ("FWPCA") forbade the discharge of any pollutant:

> "The discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a)

However, a permit program was established to allow discharge for a limited period of time subject to a series of conditions. This was the so-called NPDES program.

One of the conditions was that effluent discharges be pre-treated, to remove pollutants, by the "best practicable control technology currently available" ("BPT") by July 1, 1977. 33 U.S.C. §1311(b)(1)(A)

As indicated above, such technology was available for the Greenwich Water Company plant, for it had been approved under the 1972 Order and under the March 10, 1975 NPDES permit. Thus, we are dealing with existing answers, not imponderable problems. Nevertheless, the permit was modified on August 26, 1975 to eliminate this viable alternative and to extend the compliance date to July 1, 1978.

Such extended date was beyond statutory authority.

Government agencies may interpret statutes under which they operate, but they cannot postpone their effective date.

By way of example, the Court will recall the early experiences under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331 et. seq., effective January 1, 1970. Some agencies, such as the Federal Highway Administration, sought to put the applicable date off for many months. Such action was deemed improper.

In Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731, (D. Conn. 1972), Judge Newman ruled that regulations cannot postpone statutory dates:

> "...While regulations promulgated by those charged with enforcing a statute are entitled to careful consideration, Thorpe v. Housing Authority, 393 U.S. 268, 276 (1969); Power Reactor Development Co. v. Int'l. Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961), that principle has more application to agency interpretation of statutory language than to agency determination of when a statute becomes applicable. This attempt to postpone the effective date of NEPA by thirteen months is contrary to the words and spirit of the legislation and cannot be permitted to stand..." (pages 736-7) (Emphasis supplied.)

See also Conservation Society v. Secretary, 343 F. Supp. 761, 765-6 (D.Vt. 1972; Oakes, J.); Perine v. Norton & Co., 509 F.2d 114, 120 (2d Cir. 1974).

In the present case, the statute sets a cut-off date of July 1, 1977 for "BPT" by permittees; and the EPA regulations agree and even attempt to accelerate the date. The EPA regulations for State permit programs require that the permittee achieve compliance:

> "In accordance with any legally applicable schedule of compliance contained in: (i) Applicable effluent standards and limitations..." (40 C.F.R. §124.44(a))

EPA regulations comment:

> "Certain interim requirements such as the submission of preliminary or final plans often require less than 9 months and thus a shorter interval should be specified..." (Following 40 C.F.R. §124.44(b))

Therefore, neither statute nor regulation allows for date extensions. Nevertheless, the modified permit under challenge provides for a thirteen-month extension. Such action by the permitting agency is, therefore, on its face, arbitrary and capricious.

To allow this delay in enforcement would be condoning "what amounts to administrative or executive repeal of an Act of Congress", Sun Enterprises, Ltd. v. Train, ___F.2d___, (2d Cir., Dkt 75-6068, March 12, 1976)(Typescript at p. 13).

Further, the EPA's failure to overrule such postponement is a neglect to carry out its duty.[3]

II

THE MODIFIED PERMIT IS INVALID BECAUSE THE STEPS NECESSARY FOR COMPLIANCE ARE BEYOND THE CONTROL OF THE PERMITTEE

The purpose of the NPDES permit program is not to permit water pollution as such, but to reduce it. This is accomplished by granting permits subject to action being taken by the permittee, at stated intervals, to reduce the pollution and so meet the June 30, 1977 date.

The EPA regulations for State permit programs require action by the permittee to meet the June 30, 1977 date (and the interim compliance dates) to be sure the final date is met.

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3 The EPA must have known of this delay, for in an affidavit submitted to this Court on January 28, 1976, it states that its file contains:

> "...the permit application and related correspondence, draft permits, miscellaneous correspondence, reviewers notes and the permit and modification issued by the State of Connecticut." (Garson affidavit of January 23, 1976, ¶6)

It should be noted that the EPA files are not before this Court because of its failure to file the record, even after this Court's Order of March 22, 1976 requiring that it do so.

The EPA regulations[4] are found in Title 40, Part 124 of the C.F.R. These include:

1. §124.4 requiring that all procedures satisfy statutes and lawfully-promulgated regulations;

2. §124.42 setting forth standards to be met;

3. §124.44 requiring compliance by the permittee with schedules, having steps no more than nine months apart, to meet the compliance date.

This last section puts the burden on the permittee itself:

> "With respect to any discharge which is not in compliance with applicable standards and limitations...the permittee shall be required to take specific steps to achieve compliance..." (40 C.F.R. §124.44(a); emphasis supplied)
>
> * * *
>
> "...where the period of time for compliance...exceeds 9 months, a schedule of compliance shall be specified in the permit ...in no event shall more than 9 months elapse between interim dates..." (40 C.F.R. §124.44(b))

Cf. 40 C.F.R. §125.23(a)

Since the permit requires the Greenwich Water Company to hook up to a proposed and non-existent sewer line (the north 7,000 feet of which is not presently needed by Greenwich residents; App. 24), it follows that control of the required pollution reduction is not only in the hands of

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4 Controlling State permit programs.

others, but also is a political issue. In fact the Hearing Examiner found:

> "...the scheduling for the interceptor sewer would be entirely dependent upon the Town of Greenwich." (Exr's. Report; App. 36)[5]

It is easily conceivable that, come July 1977 or 1978, as the case may be, the Greenwich Water Company will still be polluting and no sewer will exist. To leave the Water Company in a position to do nothing and later be able to shrug its shoulders about it ("We're ready and willing, but no sewer exists"), is to subvert the Act.

To grant a permit not requiring that all action be assured by the permittee is not only arbitrary and capricious, but also outside any delegation of permitting power granted by the EPA to the State (Cf. 40 C.F.R. §§124.4 and 124.44).

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5 An example of delay of a politically-oriented issue is that sewers haven't yet been built, or started, for the needed lower 3,000 feet, under Health Department condemnation since June 21, 1972 (App. 28). (See Fact No. 3, page 6, supra.)

III

RESPONDENT EPA HAS FAILED TO EXERCISE ITS DUTY TO OVERSEE AND CONTROL THE ISSUANCE OF THIS MODIFIED NPDES PERMIT

The FWPCA provides that the EPA may delegate permitting power to the States, subject to conditions:

1. That the State program meet all of the requirements of the Act. 33 U.S.C. §1342(b). This is embodied in EPA regulations 40 C.F.R., Part 124.

2. That the EPA itself oversee the State programs. 33 U.S.C. §1319 and §1342(b), (d), and (i).

As to the latter, the EPA had knowledge of the State's action in modifying the permit (see affidavit quoted supra, page 12), but did nothing about it.

The Act specifically allows the EPA to forbid State-issued permits if they are outside the statute:

> "No permit shall issue...if the Administrator objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter." 33 U.S.C. §1342(d)(2)

Since the permit modification was outside both the Act and EPA's regulations, both as to completion date and action required by the permittee itself, it follows that EPA acted unreasonably and breached its statutory duty.

IV

THIS COURT HAS JURISDICTION

Respondents have challenged jurisdiction.

As previously stated the NPDES permit of August 26, 1975 (App. 1), now in dispute, was a modified permit.

This modified permit states that the modification was made under Conn. Gen. Stats. §25-54o:

> "The Director, acting under Section 25-54o, hereby modifies order No. 979 to require..." (Emphasis supplied.)(App. 1)

This statute, under which the permit was modified denies any right of appeal in Connecticut Courts. It states, in pertinent part:

> "...there shall be no hearing subsequent to or any appeal from any such modification or extension." (Conn. G.S. §25-54o)

We have, then, a situation where, on the one hand, a Federally-authorized type of permit cannot be reviewed in the State Courts, and, on the other hand, exclusive jurisdiction is in this Court. As stated by this Court in Sun Enterprises, Ltd. v. Train, supra:

> "...Review of the Administrator's actions in issuing or denying a permit must, by the explicit terms of §509 [33 U.S.C. §1369], be sought in the court of appeals whose jurisdiction is, absent extraordinary conditions, exclusive [citation of authority]." (Typescript at page 8)

The modified permit must, therefore, be reviewable in this Court, or no review is possible.

Since Congress explicitly intended that there be review of permits, 33 U.S.C. §1369, and also sought citizen participation in enforcement, 33 U.S.C. §1365, the "no review" alternative is neither proper nor in the spirit of the Act.

The FWPCA, at 33 U.S.C. §1369(b)(1), provides for review by this Court of permit actions by the Administrator:

> "...(F) in issuing or denying any permit under Section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals..."

It should be noted that this review is not limited to actions under §1342(a) (EPA permitting procedure), but includes all of §1342, including State permit programs under §1342(b). Thus, action by the State, under delegation, is subject to review. As the Administrator's delegee, State action is action of the Administrator. Regardless, delegation to the State under §1342(c) is of permit issuance only, not of appeals. In addition, in view of the "no appeal" provisions of Conn. G.S. §25-54o, there can have been no delegation to the State insofar as proceedure for appeals is concerned.

It is helpful in terms of statutory construction, to analyze the judicial review section of the Act, 33 U.S.C.

§1369(b)(1), as to the manner in which it deals with §1342. §1342 deals with NPDES permits in general; §1342(b) deals with State permit programs. Yet, §1369(b)(1)(F) provides for review of any permit under §1342 (not limited to any particular sub-section of §1342), while §1369(b)(1)(D) is limited to review only under one sub-section, §1342(b). Thus, Congress' intent was to permit review by this Court of permits issued under any sub-paragraph of §1342, whether issued, as a procedural matter, by the State or by the EPA.

State Respondent's assertions that delegation has taken place under §1342(c) and so it is not subject to review by this Court ignore a series of factors:

1. The State, as delegee, is acting for the EPA.

2. The §1342(c) delegation section says nothing about appeals; it only speaks of permit issuance. Nor does the Act provide for review in any Court but this one.[6]

3. Various post-delegation provisions exist for continuing supervision of State programs by the Administrator, such as §1342(b), (d) and (i).

4. There is a statutory requirement that State programs comply with §1342 and EPA guidelines, §1342(c)(2).

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6 In addition to the exclusive jurisdiction holding in Sun Enterprises, Ltd., supra., it has been held that there is "...nothing in the statute to indicate that Congress intended...concurrent jurisdiction" with District Courts. DuPont v. Train, 528 F.2d 1136, 1137 note 1,(4th Cir. 1975). See also American Petroleum Institute v. Train, 526 F.2d 1343 (10th Cir. 1975). This further suggests no Congressional intention to delegate jurisdiction to State Courts.

5. There is a lack of any right to appeal other than to this Court (Conn. G.S. §25-54o).

6. The State acted in an extra-legal, arbitrary manner in modifying the permit.

As to the last point, the permit modification was arbitrary, violating the Act and regulations by extending the date a year and not requiring action by the permittee itself. Under such circumstances, denial of access to the Courts is a denial of due process. Louisville & Nashville R. R. Co. v. Garrett, 231 U.S. 298, 58 L.ed. 229 (1913); Holmes v. N.Y.C. Housing Authority, 398 V.2d 262, 265 (2d Cir. 1968).

In the present case, if delegation of the NPDES permitting process to Connecticut has served to annul the right of review, due process has failed.

V

CONCLUSION

As shown, the actions of Respondents are outside the very Act under which they purport to have been taken.

It is respectfully suggested that this Court:

1. Annul the NPDES permit modification of August 26, 1975, since it was issued outside the statute and regulations; and thereby reinstate the permit of March 10, 1975 (with its completion date of July 1977);

2. Require that permittee itself follow the alternative of treating its discharges by July 1977 and itself meeting interim dates. (This was an alternative in the March 10, 1975 permit.)

3. Forbid the grant of further extensions of time for compliance; and

4. Direct Respondent EPA to exercise its oversight authority and duty for implementation of the above.

Respectfully,

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April 14, 1976

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Re: Mianus River Preservation Committee, et al.
v. Environmental Protection Agency, No. 75-4253

Dear Sir:

Enclosed herewith are ten copies each of Petitioners' Brief and Appendix.

In accordance with the revised rule we are retaining an additional fifteen copies of the Brief in our possession pending a possible request from your office.

This is to certify that two copies of the Brief and one copy of the Appendix have today been served by first class mail upon the attorneys for the two Respondents to wit:

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Yours very truly,

Haynes N. Johnson

HNJ:vp
Enclosures
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